TAJJUL ARIFFIN MUSTAFA

v.

HENG CHENG HONG

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL APPEAL NO. 12 - 41 OF 1989]
14 MARCH 1991

CIVIL PROCEDURE: *Joinder of co-defendant - Whether defendant can compel plaintiff to amend statement of claim to plead negligence - Discretion of judge - Available material - Rules of the High Court 1980, O. 15, r. 6(2)(b) - Subordinate Court Rules 1980, O. 8 r. 6(2)(b).*

The plaintiff who was riding pillion on a motorcyle had sued the defendant for damages arising out of a road accident. The defendant made an application for

(a) the joinder of the rider of the motorcycle. L1, and the owner of the motorcycle, L2, as co-defendants;

(b) for the plaintiff to amend the statement of claim to add the names of L1 and L2;

(c) for the plaintiff to amend the statement of claim to plead negligence against L1 and L2 (the said application);

(d) and for other incidental or related matters

The plaintiff had no objections to the defendant's application except for the application in (c); the plaintiff submitted that there is no substantive law to compel the plaintiff to sue another party and also queried as to the nature of particulars the Court would have to order the plaintiff to plead if the said application was allowed.

The learned Judge of the Sessions Court allowed all the applications except (c) holding that she could not compel the plaintiff to plead negligence against the intended co-defendant as this would involve substantive rather than procedural law. Hence this appeal by the defendant.

Held:

[1] (a) There is nothing in the Rules of High Court 1980 which prevents the defendants from making an application to join co-defendants under either O. 15 r. 6(2)(b) or O. 16. The Judge has a discretion to allow such joinder to ensure that all matters in the dispute could be effectually and completely determined and adjudicated upon under O. 15 r. 6(2);

(b) this procedural rule does not negate the rule of substantive law that each of two or more joint tortfeasors is liable for the entire damage resulting from their tortious Act.

[2] There was nothing on record to show, on a reasonable and probable basis, that L1 and/or L2 were wholly or partly responsible for the accident.

[3] To order the plaintiff to amend the statement of claim would have the effect of compelling her to sue a proposed co-defendant who, for all one knows, was not responsible at all for the accident and in effect would be compelling the plaintiff to plead particulars of negligence against the proposed co-defendants which may well be non-existent.

[4] The learned Judge of the Sessions Court had exercised her discretion correctly under O. 8 r. 6(2)(b) on the material available before her.

[Appeal dismissed.]

Cases referred to:
Bentley Motors [1931] Ltd. v. Lagenda Ltd. [1945] 2 All ER 211
Byrne v. Brown [1889] 22 QBD 657
Chan Yee v. Chan Yoke Fong [1990] 1 CLJ (Rep) 136
Hee Awa and Ors. v. Syed Muhamad Sazalay bin Syed Ali Wara & Anor. [1988] 1 MLJ 300
Norbury Natzio & Co. Ltd. v. Griffiths [1918] 2 K 369
Sutton v. Clarke [1815] 6 Taunt 29
Greenlands Ltd. v. Wilmshurst [1913] 3 KB 507

Legislation referred to:
Rules of the High Court 1980, O. 15 r. 6(2)(b), O. 16
Subordinate Courts Rules 1980, O. 8 r. 6(2)(b)

Other source referred to:
Odgers on Pleading and Practice 20 Edn., p. 20

For the applicant - Paul Manecksha (Theseira with him) Counsel; M/s. V.P. Nathan & Partners
For the respondent - Tiong, Counsel; M/s. N.M. Tiong & Co.

JUDGMENT

K.C. Vohrah J:

Before I proceed further with the appeal it would be necessary to touch on O. 15 r. 6(2)(b) of the Rules of the High Court (RHC) which is in *pari materia* with O. 8 r. 6(2)(b) of the Subordinate Court Rules 1980.

Order 15 r. 6(2)(b) of the RHC allows the High Court to add a co-defendant in proceedings before it. There was doubt whether a person who could be made a third party to the proceedings under O. 16 by a defendant for purposes of contribution from that person in a running down case could be made a co-defendant under O. 15 r. 6(2)(b) on an application by the defendant. The doubt was resolved in the Supreme Court decision in *Hee Awa and Ors. v. Syed Muhamad Sazalay bin Syed Ali Wara & Anor.* [1988] 1 MLJ 300. The decision was to the effect that the application of the defendants (the driver of a van involved in an accident and the owner of the van, the Government of Malaysia) to add a motor cyclist (on whose motor cycle the plaintiff was pillion rider) fell squarely within the terms of O. 15 r. 6(2)(b) and that the defendants had a choice to proceed either under O. 15 r. 6(2)(b) or under O. 16. The Court held that there was absolutely nothing in the Rules of the High Court 1980 to prevent the defendants from making the choice. In *Chan Yee v. Chan Yoke Fong* [1990] 1 CLJ (Rep) 36, in the Supreme Court, it was argued that *Hee Awa* was decided *per incuriam*. The Supreme Court, however, held at p. 301 that the Court was unable to "fasten on any part of the decision ... and to say that there is any slip or error."

What is important to bear in mind in *Hee Awa* is that the Supreme Court upheld the decision of the Judge of the High Court in the exercise of his discretion in allowing the defendant in that case to add the motor cyclist as defendant to ensure that all matters in the dispute could be effectually and completely determined and adjudicated upon as envisaged by O. 15 r. 6(2)(b). What transpired in so far as the accident between the motor cycle and the government van is concerned, the subject matter of the appeal before the Supreme Court, was that the pillion rider of the motor cycle was killed and a passenger in the van injured. The injured passenger of the van sued the motor cyclist in the Sessions Court and the van driver and the Government of Malaysia were made third parties to the suit. In the High Court the parents and administrator of the estate of the pillion rider sued the van driver and the Government of Malaysia, the defendants, and the defendants applied for an order that the

motor cyclist be joined as a co-defendant. As earlier stated this was allowed by the High Court and the Supreme Court upheld the decision of the High Court. The Supreme Court in upholding the decision of the High Court had this to say at p. 302:

> One of the objects of the rule is to prevent multiplicity of proceedings (see Lord Esher MR in *Byrne v. Brown* [1889] 22 QBD 657, 666 - 7 and per Evershed J at pp. 212-213 in *Bentley Motors (1931) Ltd. v. Lagenda Ltd.* [1945] 2 All ER 211. The learned Federal Counsel had informed the Court below that the respondents would be applying for consolidation of the two actions. In the circumstances, the order allowing the motor cyclist to be joined as a co-defendant is to ensure that all matters in dispute in the cause be "effectually and completely determined and adjudicated upon" as envisaged by O. 15 r. 6(2)(b) RHC. For the above reasons, the learned Judge did not err in law in exercising his discretion in favour of the respondents.

I think it can be said that at the time of the application in the High Court to add the motor-cyclist as co-defendant, all the pleadings in both the Sessions Court and High Court cases had already been laid bare for all the parties to see. It is obvious the defence of the motor cyclist, the defendant in the Sessions Court, would have been disclosed, his pleadings made known. The pleadings of the third parties (the van driver and the Government of Malaysia) in the Sessions Court must have made known too. In the High Court the pleadings of the plaintiffs (the parents and administrator of the pillion rider) and of the defendants (the van driver and the Government of Malaysia) must have been disclosed. When the application by the defendants to add the motor cyclist as co-defendant was allowed by the High Court and the Supreme Court, it was allowed with the knowledge that there was to be a consolidation of the Sessions Court case with the High Court case and undoubtedly the plaintiffs in the High Court would have been aware of the pleadings filed by the motor cyclist as defendant in the Sessions Court as indeed the plaintiffs would have been aware of the pleadings of the van driver and of the Government of Malaysia as third parties in the Sessions Court. There does not appear to be a prayer for the pleadings of the plaintiffs in the High Court to be amended. If the plaintiffs in the High Court had desired to amend their statement of claim to take into account the added defendant the plaintiffs would have some inkling of what they had to do through the third party notice and the disclosure of the third parties' pleadings in the Sessions Court in defence of the defendant's (the motor cyclists's) third party notice stating the nature and grounds of the claim. It will be noted that in the judgment of the Supreme Court in *Hee Awa*, nothing was stated about the plaintiffs having to amend their statement of claim nor about any objection being raised by the plaintiffs in the High Court that they would not be able to amend their statement of claim to take into account the addition of the motor cyclist as a co-defendant. The objection of the plaintiffs was based on something else. In fact the Supreme Court stated at p. 301 that the respondent's objection to the application:

> was not grounded on the fact that the motor cyclist's rights against or liabilities to any party would not be affected by the final outcome of the action, but was based on the irrelevant ground that the appellant would be financially better off if the respondent's application was refused.

Similarly in the subsequent Supreme Court case of *Chan Yee* there is nothing in the judgment to suggest that the plaintiff was required to amend his pleadings to take into account the added defendant nor is there anything therein to suggest that in opposing the application to add the co-defendant the plaintiff raised the issue that he would not be able to amend his statement of claim to take into account the addition of another person as a co-defendant.

The Supreme Court in both the cases has not in any way whittled down the discretion of the Court of first instance in its exercise of the powers under O. 15 r. 6(2) of the RHC (O. 8 r. 6(2)(b) of the Subordinate Court Rules 1980). In *Hee Awa* at p. 301 the Supreme Court adverted to the only issue being whether the learned Judge had exercised his discretion on correct principle and at p. 302 the Court again adverted to the issue of discretion:

> The only remaining matter that we wish to deal with is the reference by Mr. Yee Bian Tian, Counsel for the applicant, to a decision of this Court in *Cheah Fook Chuan v. Chai Chan Poh* SCCA No. 24 of 1987, made on 22 July 1987 where the refusal by Annuar J to grant an application under O. 15 r. 6(2)(b) was upheld on appeal. Two of us happened to be in that coram and having refreshed our memory from the appeal record and our notes, *it is apparent that the appeal was dismissed not because we held that the Court had no discretion but due to insufficient material in the affidavit in support of the application on which the discretionary power could have been exercised.*
>
> (Emphasis is mine).

In other words each case has to be decided on its own merits. As regards the appeal before me, in the Sessions Court, Alor Setar, Heng Cheng Hong, the plaintiff, sued Tajjul Ariffin, the defendant, for damages arising out of an accident involving two motor cycles on 4 March 1986. Heng was then riding pillion on a motor cycle ridden by one Lim Ah Chooi allegedly as the servant and/or agent of one Lim Yu Hua. The defendant was riding the other motor cycle.

In the Sessions Court Tajjul Ariffin, the defendant, applied for Lim Ah Chooi and Lim Yu Hua to be added as co-defendants on the ground that Lim Ah Chooi was wholly or substantially responsible for causing the accident. This prayer and other prayers are as follows:

1. that the plaintiff do add as co-defendants to this action, one Lim Ah Chooi @ Lim Kim Choon and Lim Yu Hua.
2. that the plaintiff do amend the title of the summons and statement of claim by adding the name of the said Lim Ah Chooi @ Lim Kim Choon and Lim Yu Hua as defendants No. 2 and 3;
3. that the plaintiff do make the necessary amendments to the statement of claim to plead negligence against the said Lim Ah Chooi @ Lim Kim Choon, the 2nd defendant as the servant and/or agent of Lim Yu Hua, the 3rd defendant added herein;
4. that the plaintiff do serve the amended summons and amended statement of claim on the said Lim Ah Chooi @ Lim Kim Choon and Lim Yu Hua, the 2nd and 3rd defendants added herein;
5. that all proceedings herein be stayed until the said Lim Ah Chooi @ Lim Kim Choon and Lim Yu Hua have been added as co-defendants, the summons and statement of claim amended accordingly and the summons and statement of claim have been served on the said 2nd and 3rd defendants;
6. that the costs of and incidental to this application be costs in the cause;
7. such further or other relief as this honourable Court may deem just and proper;

The plaintiff had no objections to all the prayers except for prayer 3, that is, the prayer "that the plaintiff do make the necessary amendments to the statement of claim" against the rider of the motor cycle on which the plaintiff was pillion rider and against the master or principal of the rider. The plaintiff objected to the prayer on the ground that there is no substantive

law to compel the plaintiff to sue another party and he raised the issue as to what particulars the Court would have to order the plaintiff to plead if the application for the prayer was allowed.

The learned Judge of the Sessions Court allowed prayers to 1 to 6 except for prayer 3 and she held the view that she could not compel the plaintiff to plead negligence against the intended co-defendant. This is what she said:

> It is indisputable that adding the co-defendants would ensure that all matters in dispute (would) be effectually and completely determined. However, to compel the plaintiff to make the amendments sought involves substantive rather than procedural law. Can the defendant then also specify the particulars of negligence to be pleaded or compel him to amend his pleadings yet again if the particulars of negligence pleaded are not satisfactory?

It was argued before her that the Court could order an amendment of the statement of claim by the plaintiff. Reference was made to *Atkin's Court Forms* (1987 Edn.) Vol. 30 at p. 11 and Form 13 at p. 40 of the same volume. Under the heading of 'Joinder of defendant' it is stated:

> As a general rule a person cannot be added as a defendant against the wishes of the plaintiff, but the Court has a wide discretion and, for example, may, on the application of a defendant, add persons alleged to be joint contractors, without the consent of the plaintiff.

The case of *Norbury Natzio & Co. Ltd. v. Griffiths* [1918] 2 K.369 was relied on, and apparently Form 13 was based on the order in that case.

She had this to say about this argument:

> In *Norbury Natzio's* case, the plaintiff had sued the defendant for a debt which the defendant admitted was due from the executors of the estate of a deceased person, of whom he was one and X another. He had applied for the plaintiff to add X as a co-defendant on the ground that they were joint contractors, so that they could then file a counter-claim against the plaintiff. In that case, any amendment would have been minimal. This is borne out by Form 13 which refers to the amendment of the statement of claim "by adding X, Y as co-defendant.

It will be noted that in *Norbury Natzio* the English Court of Appeal, without obtaining the consent of the plaintiffs, in making the order requiring the plaintiffs to add an alleged joint contractor of the contract as co-defendant was of the view that the defendant had set up a reasonable and probable case of joint contract. Pickford LJ said at p. 377:

> It is not as a rule possible for the Court to decide at this stage whether or not the contract is in fact a joint contract. That was decided in *Fardell Traction Haulage Co. v. Basset* 15 Times LR 204. I think that in the present case the defendant has set up a reasonable and probable case of joint contract, though I do not say it will be made at the trial.

Scrutton LJ at p. 379 said:

> In *Fardell Traction Haulage Co. v. Basset*, the Court went even further in the exercise of its discretion, and, being unable at that stage of the proceedings to decide whether or not the contract was in fact joint, held that, as the defendant had made out a reasonable case of joint contract, an order ought to be made joining the alleged joint contractor as a co-defendant, but at the risk of the defendant as to costs in case it should appear at the trial that the contract was not joint and that the co-defendant was not liable. As in that case, so here, I think the Court ought to make the order asked for.

It is note worthy that nowhere in the judgments of the 3 Lord Justices is there a reference that the plaintiffs had to amend their pleadings and in fact the terms of the order which appear at p. 380 of the report do not show that the plaintiffs had to amend their pleadings. The order so far as relevant is reproduced below:

> It is ordered that this appeal be allowed and that the said order of the Hon. Mr. Justice Bray be set aside. It is therefore now ordered that the said S.A. Vasey be joined as a co-defendant in this action and that the defendants be then at liberty to bring a counter-claim jointly against the plaintiffs, and that the plaintiffs are not to be prejudiced by such joinder if it should be held that the contract sued upon was not a joint contract and that the said S.A. Vasey is not liable thereon, and in that case the defendant Fred Griffiths is to pay his co-defendant S.A. Vasey his costs subject to any right of contribution one may have against the other.

Norbury Natzio of course is a decision relating to a contractual matter but the procedural aspects of the case to my mind are important in regard to this appeal when I deal with the view of the Judge of the Sessions Court on the question whether on the material available before her, there is a reasonable and probable case of the motor cyclist being liable in some way for the accident and for him to be joined as co-defendant and on the question of what the plaintiff has to plead by way of amendment to her pleadings.

In so far as the learned Judge held that she could not compel the plaintiff to plead negligence against the intended co-defendant she was merely reiterating the view of the Supreme Court in *Hee Awa* at p. 301:

> The respondents have a choice in these circumstance to proceed either under O. 15 r. 6(2)(b) or O. 16. There is absolutely nothing in the Rules of the High Court 1980 to prevent the respondent from making the choice. **In our view the rule does not affect the right of a plaintiff to procure his remedy against any particular joint tortfeasor of his choice.** (emphasis mine)

The Supreme Court did not envisage a procedural rule negating a rule of substantive law that each of two or more joint tortfeasors is liable for the entire damage resulting from their tortious act. As has been succinctly put in *Odgers on Pleading and Practice* (20 Edn.,), p. 20:

> As to defendants in an action of tort, the plaintiff has a free hand. He is not now, and never was, obliged to join as a defendant every person who is liable to him for that tort. He may, if he prefers, sue one or two; and the liability of the others will be no defence for those sued, and will not mitigate the damages recoverable, for all persons concerned in a common wrongful act are jointly and severally liable for all damages caused by it. (Co.Litt. 232a; *Sutton v. Clarke* [1815] 6 Taunt, 29; *Greenlands Ltd. v. Wilmshurst* [1913] 3 KB 507 - reversed in the House of Lords on another point [1916] 2 AC 15)

As was pointed out earlier the decisions in Hee Awa and Chan Yee were made on their own merits, on the peculiar facts obtaining in the cases and the decisions do not whittle down the discretion of the judge of first instance when applying O. 15 r. 6(2)(b) of the RHC or O. 6(2)(b) of the Subordinate Court Rules 1980 to the particular facts of the case before him.

I agree with the learned Judge of the Sessions Court that for her to have allowed prayer 3 of the application it would have meant that the plaintiff would have been compelled to plead particulars of negligence against the intended co-defendant. There was an affidavit filed in support of the application by the defendant briefly stating that the proposed co-defendant had come out of a junction and had collided with the defendant. It was an affidavit deposed to by one of the solicitors for the defendant and not by the defendant himself and the affidavit did not disclose that it was a statement of belief let alone the grounds and sources thereof. The affidavit is inadmissible as evidence and there is nothing on record to show that the proposed co-defendant was negligent and liable. Although the plaintiff had consented to the other prayers (and her Counsel said he did so to save time as his objections in previous cases had been rejected) he objected to prayer 3 and he asked:

If Court allows application, what particulars will the Court order the plaintiff to plead? Do we plead particulars relevant to this case or not?

These are pertinent questions. Bearing in mind the case of *Norbury Natzio* another pertinent question which has to be asked earlier is - is there anything on record to show, on a reasonable and probable basis, that the proposed co-defendant was wholly or partly responsible for the accident? There is none. To order the plaintiff to amend her statement of claim would be in effect to compel the plaintiff to sue a proposed co-defendant who for all one knows was not responsible at all for the accident and therefore not tortiously liable, and, more importantly, to compel the plaintiff to plead particulars of negligence against the proposed co-defendant which may well be non-existent.

In my view the learned Judge of the Sessions Court exercised her discretion correctly under O. 8 r. 6(2)(b) on the material available before her in the case and I accordingly dismiss the appeal. As agreed by the parties there is no order as to costs.

Also found at [1991] 2 CLJ 1212